

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROBERT SEDILLO GUTIERREZ,

Movant/Defendant,

v.

No. CIV 08-711 RB/LFG
No. CR 05-217 RB

UNITED STATES OF AMERICA,

Respondent/Plaintiff.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Robert Sedillo Gutierrez's ("Sedillo Gutierrez") "Motion Requesting Final Orders on Pending Pro-Se Pleadings," filed November 21, 2012. [Doc. 88.] Sedillo Gutierrez asks this Court to rule on his application for certificate of appealability and his request to proceed *in forma pauperis* on appeal. There is no need for a response.

On October 17, 2012, Sedillo Gutierrez filed a notice of appeal [Doc. 85] from the District Court's Memorandum and Order dismissing his Rule 60(b) motion as a second or successive § 2255 motion. [Doc. 83.] The Court concluded, in part, that Sedillo Gutierrez's Rule 60(b)-styled motion was a disguised attack on the district court's resolution of the habeas claims on the merits and as such, was a second or successive petition over which the Court lacked jurisdiction. Sedillo Gutierrez's appeal is pending before the Circuit Court. [Doc. 83.]

In Sedillo Gutierrez's notice of appeal, he included an application for certificate of appealability. [Doc. 85.] *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) ("In sum, we hold that the district court's dismissal of an unauthorized § 2255 motion is a "final order in

a proceeding under section 2255" such that § 2253 requires petitioner to obtain a certificate of appealability before he or she may appeal.") The Court concludes that Sedillo Gutierrez's application for certificate of appealability will be denied because he failed to make a substantial showing that he was denied a constitutional right.

Sedillo Gutierrez did not file a separate *pro se* motion to proceed *in forma pauperis* on appeal, nor did the Court locate such a request in his notice of appeal. The Court construes the present motion to contain such a request. However, the Court will deny a request to proceed *in forma pauperis* on appeal because the Court certifies that Sedillo Gutierrez's appeal was not taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

IT IS THEREFORE ORDERED that Sedillo Gutierrez's request [Doc. 88] for court rulings on pending motions is granted to the extent that both requests are denied for the reasons described herein.



UNITED STATES DISTRICT COURT